

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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SAMUEL DEJESUS,

Petitioner,

v.

Case No. 04-74756

DAVID GUNDY,

Respondent.

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**ORDER DENYING A CERTIFICATE OF APPEALABILITY BUT GRANTING  
LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL**

Petitioner Samuel DeJesus has appealed the Court's order denying his habeas corpus petition. The Court must treat the notice of appeal as an application for a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). For the reasons stated below, the court will deny a certificate of appealability and grant Petitioner leave to proceed *in forma pauperis* on appeal.

"[A] prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, [the] petitioner must first seek and obtain a [certificate of appealability.]" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, "a district court has rejected the constitutional claim[] on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Petitioner's habeas claim alleges that his trial attorney was ineffective for failing to object to evidence that Petitioner did not respond when his brother accused him of shooting the victim. The court determined that defense counsel may have decided not to object in order to avoid giving the impression that Petitioner said something incriminating in response to his brother's question. The court also determined that defense counsel's allegedly deficient performance did not prejudice the defense because the evidence against Petitioner was substantial without evidence that Petitioner remained silent when asked about the shooting.

The three state court judges who adjudicated Petitioner's claim disagreed on whether the evidence in question was admissible. However, all three judges agreed that defense counsel's inaction may have been a matter of trial strategy and that the allegedly deficient performance did not prejudice the defense. Thus, reasonable jurists likely would not find this court's assessment of Petitioner's ineffectiveness claim debatable or wrong. However, because the standard for granting *in forma pauperis* status is lower than the standard for issuing a certificate of appealability, *United States v. Youngblood*, 116 F.3d 1113, 1115 (5th Cir. 1997), the court will grant Petitioner that status for his appeal. Accordingly,

IT IS ORDERED that Petitioner's application for a certificate of appealability is DENIED. IT IS FURTHER ORDERED that Petitioner may proceed *in forma pauperis* on appeal.

S/Robert H. Cleland  
ROBERT H. CLELAND  
UNITED STATES DISTRICT JUDGE

Dated: April 6, 2007

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, April 6, 2007, by electronic and/or ordinary mail.

S/Lisa Wagner  
Case Manager and Deputy Clerk  
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